SUPREME COURT, U.S.

NOV 25 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-509

JOSEPH MONTY,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

MAURICE H. NADJARI
Deputy Attorney General
of the State of New York
Special State Prosecutor
2 World Trade Center
New York, New York 10047
(212) 466-1250

STEPHEN P. SAWYER
Special Assistant Attorney General
of the State of New York
Of Counsel

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	2
The Evidence at Trial	4
The People's Case	4
Monty, as Chief Rackets Investigator, regularly received free cars from Avis Rent-A-Car during 1968-1972	4
Pursuant to an understanding between him and Avis Rent-A-Car, Monty, in return for free cars, performed valuable law enforcement services for Avis	4
Collection of Bad Debts	4
Cancellation of Alarms	9
Criminal Record Checks	10
In September, 1971, petitioner and an Avis Zone Manager negotiated a continuation of the understanding under which petitioner would continue to get a free Avis' car in return for his continued availability to serve Avis	11
The Defendant's Case	12
Petitioner claimed the free cars were a gift from Fred Massaro	12
Monty's Admissions and Denials	14

PAGE

Argument

Point I—Petitioner was not denied any constitutional right by the appointment of Justice Murtagh as the presiding judge for the Extraordinary Term 16

Point II—Petitioner was not denied the Sixth Amendment right to confrontation by the admission of Fred Massaro's statements 22

Conclusion 26

TABLE OF AUTHORITIES

PAGE

Cases:

Baxstrom v. Herold, 383 U.S. 107 (1966) 19
Bruton v. United States, 391 U.S. 123 (1968) 25

Dutton v. Evans, 400 U.S. 74 (1970) 24, 25

Griffin v. Illinois, 351 U.S. 12 (1956) 19, 20

Loper v. Beto, 440 F.2d 934 (5th Cir. 1971), *vacated*, 405 U.S. 473 (1972) 22

Moore, In re, 108 N.Y. 280, 15 N.E. 369 (1888) 18
Murchison, In re, 349 U.S. 133 (1955) 21

People v. Davis, 67 Misc. 2d 14, 322 N.Y.S. 2d 927 (Sup. Ct. Ontario Co. 1971) 17
People ex rel. Saranac Land & Timber Co. v. Supreme Court, 220 N.Y. 487, 116 N.E. 384 (1917) 17
Pointer v. Texas, 380 U.S. 400 (1965) 25

Reynolds v. Cropsey, 241 N.Y. 389, 150 N.E. 303 (1925) 18

PAGE

Tumey v. Ohio, 273 U.S. 510 (1927) 21

United States v. Simmons, 476 F.2d 33 (9th Cir. 1973) 18
United States v. Torbert, 496 F.2d 154 (9th Cir. 1974) 18

Williams v. Oklahoma City, 395 U.S. 458 (1969) 19, 20

Statutes:

N.Y. Constitution, Article VI, §27 ..... 16, 17

N.Y. Judiciary Law §149 (1) 16, 17

N.Y. Penal Law §200.10 1

N.Y. Penal Law §200.25 1

28 U.S.C. §1257 (3) 3

U.S. Constitution, Amendment VI 3, 22

U.S. Constitution, Amendment XIV 3, 17, 19

Rules and Regulations:

9A N.Y.C.R.R. §§1.55-.59 (1972) 16

9A N.Y.C.R.R. §§1.61-.65 (1972) 16

U.S. Supreme Court R. 19 17

Miscellaneous:

4 Wigmore, Evidence §1079 (Chadbourn ed. 1972) 24

Proposed Fed. R. Ev. 801(d)(2) 24

Richardson, Evidence §244 (10th ed. 1973) 24

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-509

JOSEPH MONTY,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement

Petitioner Joseph Monty seeks a writ of certiorari to review a judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, rendered July 29, 1974, unanimously affirming his convictions of bribe receiving (N.Y. Penal Law §200.10) and receiving reward for official misconduct (N.Y. Penal Law §200.25).

Statement of the Case

On June 1, 1973, the petitioner, Joseph Monty, was indicted by the Extraordinary Special Grand Jury for the County of Queens for the crimes of bribe receiving (2 counts), grand larceny in the first degree by extortion, attempted grand larceny in the first degree by extortion, conspiracy to commit grand larceny in the first degree by extortion and receiving reward for official misconduct (2 counts). All counts of the indictment related to corrupt dealings that petitioner, as Chief Rackets Investigator of the Queens District Attorney's Office, had with Avis Rent-A-Car Systems, Inc. Prior to trial, the three counts relating to the crimes of grand larceny were dismissed and the two counts of bribe receiving were consolidated into one count.

The trial commenced on October 16, 1973, and on November 5, 1973, the petitioner was convicted of bribe receiving and one count of receiving reward for official misconduct. On March 18, 1974, petitioner was sentenced to an indeterminate term not to exceed four years on each conviction, sentences to run concurrently.

On appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, the petitioner challenged the Trial Court's failure to disqualify itself, the failure to charge an Administrative Code violation as a lesser-included offense, the failure to charge bribe receiving and receiving reward for official misconduct as inconsistent crimes, the sufficiency of the evidence of bribe receiving, the Trial Court's definition of

"official misconduct," and the propriety of the cross-examination of the petitioner.

The Appellate Division rejected these contentions and unanimously affirmed petitioner's convictions on July 29, 1974.

On August 5, 1974, Judge Harold A. Stevens of the Court of Appeals of the State of New York denied petitioner's motion for leave to appeal to the Court of Appeals.

On September 6, 1974, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, denied petitioner's motion for reargument.

In the instant petition, petitioner seeks certiorari pursuant to 28 U.S.C. §1257(3). In his petition he alleges that being tried by a specially appointed judge denied him due process and equal protection of the law under the Fourteenth Amendment and that his Sixth Amendment right to confrontation was violated by the admission of certain alleged hearsay testimony at trial.

Neither of these two claims was raised by petitioner on his appeal to the Appellate Division. The latter claim was raised by petitioner on a motion to reargue the decision of the Appellate Division. This motion was denied by the Appellate Division on September 6, 1974.

THE EVIDENCE AT TRIAL

The People's Case

Monty, as Chief Rackets Investigator, regularly received free cars from Avis Rent-A-Car during 1968-1972.

The petitioner, Joseph Monty, was, during the period 1967-1972, the Chief Rackets Investigator of the Queens County District Attorney's Office (618-9*).

During this time petitioner was in constant receipt of free cars from Avis Rent-A-Car Systems, Inc. (135-184; 372-3; 377). The evidence, establishing the receipt by petitioner of free cars was conclusive. From 1968 through November, 1971, he was given the free use on a monthly basis of a variety of new automobiles, including Plymouths, Dodges, Chryslers and a Cadillac (135-184). From November, 1971, through November, 1972, petitioner was given the use of a 1972 Chevrolet Impala, which was registered in his own name (372-3; 377). The value of the use of these cars, were a person to have paid the applicable market rate, was calculated to have been several thousand dollars. For these cars Monty never paid any money (Peo. Exhs. 1-20; 377; 478; 597; 762).

Pursuant to an understanding between him and Avis Rent-A-Car, Monty, in return for free cars, performed valuable law enforcement services for Avis.

Collection of Bad Debts

Charles Napolitano, an Avis District Manager, testified that there was a regular procedure at Avis for collecting unpaid debts (119). First, the rental agent would

* References are to the trial record.

make calls to the debtor (119). After that, the matter would be turned over to the Avis central collections department (119). If still uncollected, the matter went to an outside collection agency.

In early 1970 Napolitano had occasion to make use of Monty in a debt collection matter. Napolitano had a conversation with Ray Bonini, an employee working for him, concerning a collection problem involving a woman named Eleanor Modica (488). Mrs. Modica had rented several cars from Avis and had paid for the cars with bad checks (479). She had run up a debt to Avis of $1,093.88 over a period of two years (485). Avis had resorted to collection procedures within the company and then to outside collection agencies, all without success (479-80). After his conversation with Napolitano, Bonini called Monty and arranged to see him concerning the matter (488). He told Monty of Avis' unsuccessful collection efforts and that he wanted to prosecute Mrs. Modica, to which Monty responded affirmatively, advising him to bring over the material (489).

After Bonini's request for help in the Modica matter, petitioner had Mrs. Modica brought into the District Attorney's Office (697-8). Petitioner told her that he did not usually act as a collection agency and told her what she did was bad and that she could be prosecuted for it (699). He then asked her if she "wanted to go to jail" (699). Mrs. Modica replied that she did not (700). Petitioner then told her that she could avoid going to jail if she paid Avis (700). At this point, petitioner called Ray Bonini and asked him to come down (492-3). After Bonini arrived, he asked him,

in front of Mrs. Modica, whether he would be willing to forego prosecution if he received payment, to which Bonini assented (702-3; 493-4).

Petitioner then gave Mrs. Modica thirty days to pay (703). During that thirty day period, around the July 4th weekend, someone representing himself as a detective from the District Attorney's Office called her and told her she had a date to come in and pay and not to leave town (706-7). Subsequently, Mrs. Modica came in to Monty's office with a check for the full amount owed Avis, which was given to Bonini (704-5; 498). At no time was Bonini asked to sign a criminal complaint (500). At no time was any civil action commenced against Mrs. Modica by Avis (706).

Later in 1970, Napolitano again had occasion to make use of Monty in another collection matter. In the middle of the year Napolitano learned of a debt of some $5,000, half in unpaid bills and half in bad checks, owed Avis by a man named Walter Halpern (197). This debt, which had been accumulating for over a year, had been given out to a collection agency without success (197). After learning of the Halpern situation, Napolitano called petitioner and asked him to look into the matter, to which petitioner agreed (202-3). At petitioner's request, Napolitano delivered to him Halpern's unpaid rental agreements and bad checks (204).

Upon receiving from Napolitano the materials in the Halpern matter, Monty delegated the matter to Detective Murray Seliger (626-7). Seliger then called Halpern who told him it was a civil, not a criminal matter and that the District Attorney's Office shouldn't be involved (788; 633).

Monty relayed this information to Napolitano (209). Napolitano then inquired whether criminal charges could be preferred and, if so, whether collection was likely (209). Monty then told Napolitano that collection would be likely (210).

Subsequently, Halpern had a conversation with Seliger during which the amount of debt related to bad checks—$2,309—was totaled and given to him (791-2; 641; Peo. Exh. 28-C). Halpern was then told that he had been indicted and that to straighten it out he would have to pay Avis $3,000 with the balance of his debts in notes (790). Halpern asked whether $3,000 would "settle the entire indictment," to which Seliger replied that he would have to check with the foreman of the Grand Jury to find out if that would be sufficient to quash the indictment (791). Shortly thereafter Seliger said that Halpern would have to pay $3,000 and the balance in notes (791). Seliger denied this part of the transaction (647).

Halpern then went to his partner and borrowed $2,309 in the form of a certified check drawn on the Manufacturers Hanover Trust Company (792; Peo. Exh. 67). On March 25, 1971, Halpern brought the check to the District Attorney's Office and signed in to see Seliger (795; Peo. Exh. 68). He spoke to Seliger and to a Lieutenant Mahoney (797). Mahoney told Halpern that he was supposed to have come in with three thousand dollars (797-8). He said that the representative of Avis was in the next room and that this thing could be straightened out if Halpern paid the $3,000 and signed for the balance (798). Mahoney also told Halpern that if he didn't pay by the next day he would be locked up (798).

Visitors sheets maintained by the District Attorney's Office for March 25, 1971, show that Halpern was there to see Seliger that day and that Charles Napolitano had signed in to see petitioner (Peo. Exhs. 68, 82 and 83). Petitioner's office was in the same small portion of the District Attorney's Office as Detective Seliger's room (1107-9). Seliger denied that Halpern visited him that day (647-8).

Subsequently, Halpern was arrested and charged with larceny and, eventually, after pleading guilty to a misdemeanor, was ordered by a court to pay Avis as a condition to his discharge (804A-808). This he did do, by giving Avis a check for $2,309 and the balance in notes (808; 217).

After Halpern's sentence, Napolitano went to petitioner's office where petitioner told him that he and his staff had worked hard on the case at which point Napolitano offered, without objection, to give petitioner $500 (218-20). Napolitano then discussed the payment with the collections manager at Avis who later advised him that such payments were illegal (223-6). Notwithstanding this advice, Napolitano, with the consent of his boss, Salvatore Giuffrida, cashed an Avis petty cash check for $500 (226-32; Peo. Exh. 31).

On September 8, 1971, Napolitano went to the District Attorney's Office and signed the visitors sheet to see petitioner (232-3; Peo. Exh. 32). Napolitano met petitioner alone in his office and gave him $500 in cash in an envelope, which petitioner took (234). That same day, petitioner deposited $150 in cash in his account down the street from his office in the Sterling National Bank (1137; Peo. Exh. 84).

Cancellation of Alarms

Alarms are orders put out to all police to be on the lookout for a car described therein which has been reported to have been stolen (121). An alarm may be placed by Avis because a car is actually stolen or because a customer failed to return the car (121). It may also be placed because personnel in the Avis central car control office have misplaced or misfiled records of a car (536-38). For whatever reason the alarm was placed, its prompt cancellation is of economic value to Avis since a vehicle rented while an alarm is outstanding on it could result in the arrest of a legitimate customer and a subsequent lawsuit against Avis (122).

Joanne Held, a rental agent, accompanied Fred Massaro to petitioner's office, in the District Attorney's Office, where Massaro requested that an alarm on a stolen car be cancelled (575-9; Peo. Exh. 52). The cancellation was made by Monty (528-9).

On another occasion Richard Zaia, Avis car control manager, turned, through Fred Massaro of Avis, to Monty for the cancellation of alarms (558). In early 1970, Zaia requested help in cancelling some alarms from Massaro (543). After reporting that the alarms had been cancelled, Massaro told Zaia that his "Uncle Joe" (a reference to petitioner Monty) had cancelled the alarms (546). Avis' business records show at least one alarm listed as having been cancelled at that time by "Joseph Monty—D.A.'s Office Queens" (Peo. Exh. 55).

In February 1972, at the request of Salvatore Giuffrida, Monty cancelled several alarms for Avis by writing to the Police Department (Peo. Exh. 37).

Criminal Record Checks

A criminal record is a listing of all arrests a person has sustained (832). It is obtainable from the Identification Section of the New York City Police Department (832). The Identification Section is the only branch of the Police Department which keeps such records (834). While criminal records are confidential, the information may be obtained by a telephone call from a properly identified legitimate law enforcement official (838; 841). Once the official is properly identified, the information can be obtained by giving the Identification Section the name and date of birth of the subject of the inquiry (836-37). The use of the information, however, is limited to legitimate law enforcement purposes (841; Peo. Exhs. 78 and 78A).

Avis developed a need to obtain such information (716-18). The personnel department had to hire people who would handle money and who, therefore, had to be bonded (602; 714). Mary Elliott, Avis training manager, and a former rental agent, had a conversation with Gail Rachlin, a personnel manager for Avis (598; 715). In that conversation, Miss Elliott recommended petitioner as someone who could help with the problem (600; 718). After the conversation, Miss Elliott called Monty and told him about the problem (602). Petitioner said "fine" and offered to discuss the matter over lunch (602). Thereafter, petitioner met with Miss Elliott and Miss Rachlin for lunch at the Elks Club (603; 721). At that lunch the two Avis representatives explained Avis' need for applicants' criminal records (604; 722). Petitioner pointed out that he wasn't supposed to do that but agreed to obtain the information for Avis (604; 722-3).

After the luncheon petitioner did, on several occasions, inform Miss Rachlin of the criminal records, if any, of prospective Avis employees (724-7). Miss Rachlin would call petitioner and give him the subject's name and date of birth (724-5). Petitioner would then call back with "exactly what the individual was involved in, if anything" (725).

In September, 1971, petitioner and an Avis Zone Manager negotiated a continuation of the understanding under which petitioner would continue to get a free Avis car in return for his continued availability to serve Avis.

In the summer of 1971, Avis Zone Manager Salvatore Giuffrida made a decision to discontinue giving petitioner free cars (354). Shortly thereafter Giuffrida was contacted by Fred Massaro, who was about to leave Avis, concerning a continuation of the situation (355). Thereafter Giuffrida received several telephone calls from petitioner himself which Giuffrida did not return (362). Eventually, Monty contacted him and a luncheon meeting was arranged (363-65).

Shortly thereafter petitioner and Giuffrida met for lunch to discuss the free car arrangement (366-7). At that lunch, according to Giuffrida,

> "Monty specifically related to his past relationship with Avis Rent-A-Car and expressed a desire to continue that relationship, whereby he was helping us in different problems of collection, bad checks, placing alarms, removal of alarms, and in return he was looking for a complimentary car which he had been given in the past." (367).

Microcard Editions

U.S. SUPREME COURT RECORDS, BRIEFS

CD-0907-74
2 OF 2
74-509

MONTY V. NEW YORK

Petitioner also mentioned specifically a debt collection for which he took credit involving a woman, presumably Eleanor Modica (367). Giuffrida did not accept at once, but after consulting with Charles Napolitano on the matter, he agreed and gave petitioner a new 1972 Chevrolet registered in petitioner's own name (368; 371-3; Peo. Exh. 36).

After this meeting, petitioner continued to render his services. In early 1972, Richard Zaia, Avis Car Control Manager, asked Giuffrida if he could contact Monty about cancelling some alarms (558). Giuffrida agreed and Monty was contacted (382-4). The alarms were then cancelled (Peo. Exhs. 37, 37A, 58B, 59A, 60A, 61A, 62A).

The Defendant's Case

Petitioner claimed the free cars were a gift from Fred Massaro.

Petitioner took the stand in his own defense and related how he had met Fred Massaro sometime in 1968 in the District Attorney's Office (900-05). He testified that two months later, he contacted Massaro about buying an Avis Car (905-06). After a meeting with Massaro, he (Massaro) gave him a free car for a month (908-09). Massaro mentioned the problem he was having parking all the cars he controlled (908). After the month was up, the free car was renewed (912). Monty again asked to buy a car but Massaro again said he didn't have one available (911). In giving him another free car, this time Massaro told him that petitioner's using the free car helped prevent its theft (912).

About a month later, petitioner returned and again tried to buy a car (913). Massaro once more told him he didn't

have one, but gave him another free car (913). The same thing happened again somewhere around September, 1968 (916). Again, Monty got a free car (918).

Throughout 1968, petitioner continued to get a free car (918-19). Sometime in 1969, petitioner stopped discussing buying a car (930). He admitted receiving a free car monthly for all of 1969 (923). He later admitted that the free car continued uninterrupted until November, 1972 (930).

Throughout his testimony, petitioner maintained that the only reason he got the four years of free cars was his friendship with Massaro. Several times when he picked up a car, he and Massaro had lunch or coffee and talked about their families (913; 916-17; 918; 919; 925; 927; 943-44). Massaro came to his home (931), introduced him to his superiors—Elkins, Elins and Napolitano (922), and called him "Uncle Joe" (922).

Petitioner also developed a friendship with Charles Napolitano (928). On one occasion, he went to lunch with Napolitano and Massaro (927). Another time, Monty said that he went to lunch with Massaro, Napolitano and Salvatore Giuffrida, where families were discussed (944-45).

In 1971 Massaro called him and informed him that he was leaving Avis (977). Massaro then assured him that he would continue to get a free car (979-80). Petitioner protested that he had to buy a car since then District Attorney Thomas Mackell had told him that an attorney for a defendant in Queens had informed one of Mackell's assistants of petitioner's free car and planned to use it as

leverage to get his client's case dismissed (986). Massaro then told petitioner that he would contact Giuffrida and later told petitioner to call Giuffrida (987). Petitioner called Giuffrida and arranged a luncheon meeting (988-9).

Petitioner stated that, when he met with Salvatore Giuffrida in September of 1971, he tried to give up the free car and buy one, but that Giuffrida insisted he continue to take a free car (992-93). Petitioner told Giuffrida of Mackell's request that petitioner get rid of his Avis car (992). Giuffrida then explained that he could give him a car with a private, not a rental plate (992). Monty said that this arrangement would be objectionable because his boss had insisted that he get rid of his complimentary car (992-93). Giuffrida then pointed out that the car would be registered in petitioner's name (993). After added assurances that everything would be okay, petitioner finally accepted the offer (993). He did not offer a reason for Giuffrida's insistence on giving him a free car.

Monty's Admissions and Denials

In addition to the receipt of free cars, petitioner admitted to cancelling certain alarms for Avis (1124-25), although he said he did so only five times (998). He also said that he always had someone else cancel the alarms for him (998; 1155).

Petitioner denied having discussed checks of criminal records at the luncheon with Mary Elliott and Gail Rachlin (938). He did admit, however, that he had caused checks of criminal records to be made for Avis, but claimed it

only happened three times (999). These services he said were performed by others for him (999-1000).

He denied having gotten a "yellow sheet" (Identification Section record) from anyone (934; 968). He denied knowing whether the Identification Section was contacted (999; 1000).

Monty admitted to having been involved in the Modica transaction, but denied that he was asked to collect the debt (984; 954-55; 1090-92). He admitted to having been involved in the Halpern transaction but again denied that anyone asked him to collect (955-56; 1095). He denied having been told by Seliger about Seliger's first conversation with Halpern (959). He also denied having told Napolitano of this conversation (1097-98). He denied recalling whether Charles Napolitano came to see him on March 25, 1971 (1123). He also denied that he had taken the $500 cash from Napolitano (975; 1141).

Petitioner denied that, at the luncheon with Salvatore Giuffrida, he had discussed the matters brought to him by Avis (993). He also denied that he had mentioned a collection matter involving a woman (1092-93).

At several points petitioner denied that he had ever had a discussion with Massaro or any other people from Avis about what he could do for Avis (929; 941; 944; 993; 1000).

ARGUMENT

POINT I

Petitioner was not denied any constitutional right by the appointment of Justice Murtagh as the presiding judge for the Extraordinary Term.

Petitioner Joseph Monty was tried before an Extraordinary Term of the New York Supreme Court, which had been established in October, 1972 by executive order of the Governor of New York pursuant to the authority vested in him by Article VI, Section 27 of the New York State Constitution and Section 149(1) of the State Judiciary Law.* The Hon. John M. Murtagh, a Justice of the New York State Supreme Court, was designated to preside over the Extraordinary Term.

Petitioner contends that "[t]he specific designation of a particular judge to try all the cases initiated by the

---

*Article VI, Section 27, of the N. Y. State Constitution provides, in relevant part: "The governor may, when in his opinion the public interest requires, appoint extraordinary terms of the supreme court. He shall designate the * * * justice who shall hold the term." Section 149(1) of the Judiciary Law parallels the constitutional provision.

The Extraordinary Term of Court was mandated by executive order to handle matters brought before it by the New York State Special Prosecutor's Office. 9A N.Y.C.R.R. §§1.61-.65 (1972). The Special Prosecutor's Office had been created on September 19, 1972 by executive order of then Governor Nelson A. Rockefeller directing the Attorney General of New York to appoint a special deputy attorney general to supersede each of the District Attorneys in the five counties of New York City in all cases "arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York." 9A N.Y.C.R.R. §§1.55-.59 (1972). Pursuant to this executive order, the New York Attorney General appointed Maurice H. Nadjari a deputy attorney general and the Special State Prosecutor.

Special Prosecutor is discriminatory and violates both due process and equal protection of the law under the Fourteenth Amendment." Petitioner's Brief for Certiorari at 5.

Petitioner's argument that his trial before the Extraordinary Term of Supreme Court denied him his constitutional rights of due process and equal protection of the law is frivolous and without merit. Indeed, petitioner only expresses his argument in constitutional terms so as to gain access to this Court. A searching examination of petitioner's claim reveals that he is merely charging Justice Murtagh with bias.

Such a claim certainly does not meet the test of Rule 19 of this Court that a petitioner, to gain access to the Court, state a "federal question of substance." U.S. Supreme Court R. 19.

The Governor's authority under the New York State Constitution and the Judiciary Law to appoint an Extraordinary Term and designate a presiding justice has been squarely held by the New York Court of Appeals not to violate any right afforded by the United States Constitution. *People ex rel. Saranac Land & Timber Co.* v. *Supreme Court*, 220 N.Y. 487, 116 N.E. 384 (1917) (Cardozo, J.). *Saranac* has not been challenged or questioned by any court since it was decided in 1917. Recently, a lower state court in *People* v. *Davis*, 67 Misc. 2d 14, 322 N.Y.S. 2d 927 (Sup. Ct., Ontario Co. 1971), followed Judge Cardozo's decision in *Saranac* and forthrightly rejected the defendants' arguments that Section 149(1) of the Judiciary Law and Article VI, Section 27 of the New York Constitution were, on their face, unconstitutional. In view of

such established and well reasoned New York decisions, there is no proper basis justifying the granting of certiorari by this Court.

In the face of this constitutional and well established scheme concerning the designation of a special presiding judge for an Extraordinary Term, petitioner attempts to interpose a local court rule regarding the assignment of judges. Petitioner's Brief for Certiorari at 5. The New York Constitution, however, obviously supersedes such local court rules insofar as such rules are in conflict with a constitutional provision.*

Petitioner, moreover, places undue weight on the purported "substantive" policies behind these rules of court administration. While the assignment of judges on a random basis is a commendable and wise rule of judicial administration, it is not a constitutional requirement. In *United States* v. *Simmons*, 476 F.2d 33 (9th Cir. 1973), the Ninth Circuit rejected a defendant's claim that he had an absolute right to the random selection of a judge. And, in a later decision, *United States* v. *Torbert*, 496 F.2d 154, 157 (9th Cir. 1974), the Ninth Circuit made it clear that the local court rule providing for random selection was "a

* Contrary to petitioner's assertion, rules of court have the force and effect of statutes *only* when they are made under *special* statutory authority. *In re Moore*, 108 N.Y. 280, 15 N.E. 369 (1888) (Petitioner refused an exemption from Court of Appeals rule requiring proof that applicant for admission as attorney has passed the regents' examination.). It should also be noted that any "conflict" between the New York Constitution and local court rules is limited to the designation of the presiding judge. As the Court of Appeals pointed out in *Reynolds* v. *Cropsey*, 241 N.Y. 389, 395, 150 N.E. 303 (1925), the Extraordinary Term is "to be conducted in accordance with the rules of law governing all other terms of court with the exception of a designation of the judge."

housekeeping rule for the internal operation of the district court which has a 'large measure of discretion in interpreting and applying' it" and that the local rule did not give a defendant "a vested right to any particular procedure," so long as the alternative procedure is constitutionally permissible.

The designation of a presiding judge for the Extraordinary Term is clearly such a constitutionally permissible procedure which does not result in any unconstitutional discrimination against persons in petitioner's position. In fact, it is difficult to even discern the alleged unconstitutional discrimination of which petitioner complains.

It is well established that, under the equal protection clause of the fourteenth amendment, states are permitted to make distinctions between persons so long as these are not "unreasoned" (*Williams* v. *Oklahoma City*, 395 U.S. 458, 460 (1969)) or "invidious." (*Griffin* v. *Illinois*, 351 U.S. 12 (1956)). It is equally well established that state distinctions between persons are constitutionally valid if there is some legitimate state purpose for which the classification is made and if the classification reasonably serves the state purpose. *See, e.g., Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966).

New York's scheme concerning the appointment of a special presiding judge for an Extraordinary Term is both rational and justifiable in light of the vital and substantial state interests involved. The extremely sensitive nature of the investigations conducted by the Office of the Special State Prosecutor, some of which concern individual mem-

bers of the state judiciary, requires that as few persons as possible know of on-going inquiries by the Office. The appointment of a special presiding judge for the Extraordinary Term serves to preserve the secrecy of such sensitive investigations.

Moreover, New York's scheme involves no invidious discrimination. The instant situation bears no resemblance to the state procedures condemned by this Court in *Griffin* v. *Illinois, supra*, which, in practical effect, distinguished between criminal defendants on the basis of their relative wealth.

Petitioner cannot reasonably argue that he would have fared any differently had he been tried before a Regular Term judge and a jury instead of before the Extraordinary Term and a jury. Certainly, the evidence overwhelmingly establishing his guilt of his crimes would have been the same had he been tried before a Regular Term judge and a jury. Moreover, evidentiary rulings and the charge to the jury (held by a unanimous Appellate Division to have been proper in the trial presided over by Justice Murtagh) would have been the same or substantially the same had petitioner been tried before a Regular Term judge.

In sum, while petitioner's trial before the Extraordinary Term may have been disparate from his trial before another State Supreme Court justice, such disparity, if any, does not even remotely approach the sort of "prejudicial disparities" prohibited by the equal protection clause of the Fourteenth Amendment. *Williams* v. *Oklahoma City, supra.*

Indeed, as mentioned at the outset, while petitioner expresses his argument in constitutional terms, in reality, he is merely charging Justice Murtagh with bias. Petitioner has based his entire argument on the faulty premise that a judge designated to preside over an Extraordinary Term will necessarily be an unfair and pro-prosecution judge. Such reasoning is clearly unsupportable at law and under the instant facts.

It should be noted that all of the petitioner's claims concerning Justice Murtagh's alleged actual bias on the trial were explicitly raised by him in his appeal before the Appellate Division. Petitioner's Brief before Appellate Division at 7-19.* Such claims were, however, soundly rejected by the Appellate Division in its unanimous affirmance of petitioner's conviction.

Finally, the precedents and other materials invoked in petitioner's brief reveal the lack of any real grounds for the granting of certiorari. To begin with, petitioner cites *Tumey* v. *Ohio,* 273 U.S. 510 (1927), and *In re Murchison,* 349 U.S. 133 (1955), in support of his argument, yet neither decision has any real bearing on the instant procedures. In *Tumey* v. *Ohio,* this Court, faced with a situation where the trial judge would be paid for his service only when the defendant was convicted, quite naturally held that the judge's direct pecuniary interest in conviction denied defendants due process of law. *In re Murchison,* meanwhile, involved a Michigan statute which, in effect, authorized a judge to act as a "one-man grand jury". Under this statute the judge was able to interrogate, charge, try and convict the same person. Certainly, the instant procedures

* Respondent's answer to these claims is found in its brief before the Appellate Division at 25-33.

do not involve the extremes presented in *Murchison* and *Tumey*.

In this same vein, petitioner cites *Loper* v. *Beto*, 440 F.2d 934, 941 (5th Cir. 1971), *vacated*, 405 U.S. 473 (1972), for the proposition that equal protection includes "the right to be tried in the same manner as others accused of similar infractions". *Loper* involved the right to a hearing in a parole revocation procedure. *Loper's* claim of a denial of equal protection was rejected by the Fifth Circuit and never passed on by this Court.

In sum, petitioner's claim that his trial before the Extraordinary Term denied him constitutional rights is baseless and, accordingly, review of petitioner's conviction by this Court is not justified.

POINT II

Petitioner was not denied the Sixth Amendment right to confrontation by the admission of Fred Massaro's statements.

Petitioner contends that the admission on his trial of certain statements of Fred Massaro* offered via other witnesses called by the prosecution constituted a violation of his sixth amendment right to confront witnesses against him.** Petitioner's Brief for Certiorari at 11.

* Massaro, a fugitive in Florida, was unavailable to testify at the trial (1181-1185).

** It is significant that while the issue concerning Massaro's statements was raised by petitioner in his post-trial motions before the trial court and his motion for reargument before the Appellate Division, it was not raised on petitioner's direct appeal to the Appellate Division presumably because its utter lack of merit was quite apparent.

It is petitioner's astonishing claim that the "entire [prosecution] case" was based on these statements. *Id.*

In fact, there was an overwhelming array of evidence, consisting of direct testimony by Avis personnel and extensive documentation conclusively establishing the corrupt relationship between Avis Rent-A-Car and petitioner which was wholly independent of Massaro's statements.

At issue, basically, are three conversations involving Massaro. One was between Massaro and Charles Napolitano; another was between Massaro and Richard Zaia; the last was between Massaro and Salvatore Giuffrida.

The first conversation consisted of testimony by Napolitano that Massaro told him that petitioner was the Chief Investigator of the Queens District Attorney's Office and that he had been helpful to Avis in the past and could be in the future (133).

After this conversation with Massaro, Napolitano testified that he learned through his direct contact with Avis documents and Monty himself that Monty was regularly receiving free cars, and that, in return for this Avis largesse, Monty played a role on behalf of Avis in the collection of bad debts (199-204).

The second conversation was one between Richard Zaia, an Avis employee, and Massaro concerning Monty's ability to cancel alarms for Avis (546). There was ample direct evidence, testimonial and documentary, independent of this conversation which established that Monty, in return for free Avis cars, was instrumental in cancelling stolen car alarms for Avis.

The final conversation consisted of testimony by Sal Giuffrida that in 1971, after Giuffrida had cancelled Monty's free Avis' car, Massaro called him and urged him to reconsider this action, because Monty as chief investigator for the local district attorney had been and could continue to be helpful to Avis (360-61). There was an abundance of evidence offered by Giuffrida of subsequent direct contact between him and Monty including a luncheon meeting at which Monty and Giuffrida explicitly agreed to the continuation of free cars for Monty provided he continue to render law enforcement services to Avis (367).

Petitioner's claim that the admission at his trial of these statements of Massaro through prosecution witnesses denied him his constitutional right to confront a witness against him presents no substantial federal question in view of this Court's decision in *Dutton* v. *Evans*, 400 U.S. 74 (1970).

Testimony as to Massaro's statements was clearly admissible as the statements of an accomplice or of a co-conspirator in the furtherance of a criminal conspiracy.* The rule under which Massaro's statements were admissible, the co-conspirators exception to the hearsay rule, is well established in both federal and state law. *See* 4 Wigmore, Evidence §1079 (Chadbourn ed. 1972); Richardson, Evidence §244 (10th ed. 1973). In fact, the proposed Federal Rules of Evidence, in Rule 801(d)(2), even adopt this established exception to the hearsay rule.

* It should be noted that Massaro's statements were not admitted for their truth, but rather as the acts, conduct and statements of an accomplice of the defendant (131-32).

It is equally clear that the admission of Massaro's statements, the statements of a co-conspirator made in the course of a conspiracy, violates no constitutional right afforded petitioner. In *Dutton* v. *Evans, supra,* this Court held that the admission of a co-conspirator's declarations, though not made in the presence of the person against whom they were offered in evidence, did not violate the confrontation clause of the Sixth Amendment or the rule laid down in *Bruton* v. *United States,* 391 U.S. 123 (1968).

The decisions of this Court, relied upon by petitioner, of *Bruton* v. *United States,* 391 U.S. 123 (1968) and *Pointer* v. *Texas,* 380 U.S. 400 (1965), do not support petitioner's claim.

In the *Bruton* decision, the Court specifically noted that there was not before it "any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." 391 U.S., at 128 n. 3. Moreover, the Court in the *Dutton* decision explained that *Bruton* and *Pointer* v. *Texas, supra,* had no application to a case involving the introduction of a co-conspirator's statements. 400 U.S. at 84-86.

Finally it should be noted that the fact that petitioner was not specifically charged with conspiracy is of no import. In *Dutton,* the defendant was not prosecuted for conspiracy, but rather for the substantive offense of murder.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MAURICE H. NADJARI
Deputy Attorney General
of the State of New York
Special State Prosecutor

STEPHEN P. SAWYER
Special Assistant Attorney General
of the State of New York
Of Counsel

Dated: New York, N.Y.
November 22, 1974